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Transfer of Fiduciary Guarantee Object Under the Hands of the Debtor without the Creditor's Consent in the Consumer Financing Agreement (Study at PT Adira Dinamika Multifinance TBK Banda Aceh)

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Abstract

Article 23 paragraph (2) of Law No. 42 of 1999 concerning Fiduciary Guarantee states that: "Debtors are prohibited from transferring, pawning, or renting to other parties objects that are objects of Fiduciary Guarantee that are not items of inventory, except in advance written from the fiduciary recipient. In practice, the transfer of the fiduciary guarantee object is carried out by the Debtor without the consent of the Creditor. This happens in the consumer financing agreement of PT Adira Dinamika Multifinance with the Debtors with the object of guarantee in the form of motor vehicles. This study aims to explain the transfer of motor vehicle guarantee objects with fiduciary guarantees without creditor approval. The study will also discuss the form of legal protection for creditors against the transfer of fiduciary collateral objects. The research method used is normative legal research method. The materials used are primary legal materials, secondary legal materials, and tertiary legal materials. The primary data was obtained through interviews and field studies. The secondary data is obtained through the study of documents and literature. The results showed that the transfer of fiduciary guarantee objects in consumer financing agreements resulted in debtors having committed defaults as well as Unlawful Acts. Legal protection of creditor rights can be implemented through the registration mechanism of fiduciary guarantee and the sale of fiduciary guarantee objects through the conduct of auction sales. Legal protection can also be done by loading objects with a fiduciary guarantee deed made with an authentic deed in order to appear the principle of speciality.

Keywords: *Transfer of Fiduciary Guarantee; The Consumer Financing Agreement; Debtor*

Introduction

The increasing public need for financial institutions in business activities and simultaneous trading has triggered the birth of non-bank financial institutions that provide financing facilities (services) for the community through installment payment systems (credit). Such conditions are certainly a promising opportunity for businesses to be able to attract profits by opening business opportunities in the field of financing and financial services facilities (finance). With consumer finance, people do not need to provide too much funds to realize their desire to buy the goods needed, simply by providing only 10 to 20% of the price of goods as a down payment (DP) then the public can already

bring home the goods they want.¹

Based on Presidential Regulation No. 9 of 2009 concerning Financing Institutions mentioned that consumer financing institutions are activities carried out in the form of providing funds for consumers for the purchase of goods (consumptive) whose payments are made in installments or shrinking. At each financing given to consumers must be preceded by an agreement. Article 1338 of the Civil Code states that all agreements made legally, applicable as law to those who make them, referred to in this article is a legally made agreement meaning it is not contrary to the law, binding for both parties. This agreement in financing institutions is called a debt-receivable agreement or credit agreement.

Financing institutions are unlikely to provide loans in the form of funds without adequate guarantees from consumers (debtors). This is a common principle in lending, both by banking financial institutions and non-bank financial institutions. This is because every credit will always contain risks if in the future there is a congestion of payments from consumers (debtors).

In debt-receivable agreements, consumers (debtors) are required to provide adequate material guarantees.² There are basically no credits that do not contain guarantees. In credit financing in leasing is the Motor Vehicle Ownership Book (BPKB) as collateral. There is no credit that does not contain collateral, to guarantee that if at any time the debtor is unable to pay the debt installments, then the object of the guarantee should be used as an alternative means of debt repayment by selling it at auction to cover the payment obligations of consumers (debtors) who are in debt.

In order for the debt to be withdrawn easily when the debtor defaults, the creditor or financing institution must choose the types of guarantees that provide convenience and practicality by placing the creditor as a special position holder and preferably from other creditors. In addition, the guarantee must have a value that is at least equal to or even higher than the value of the obligation that must be paid by the debtor.

Against goods or objects belonging to the debtor that is used as collateral, a contract will be made so-called a guarantee agreement. This guarantee agreement arises because of the existence of a principal agreement, which is a loan agreement or credit agreement. The guarantee agreement cannot stand on its own, but rather always follows the basic agreement. If the principal agreement expires, the guarantee agreement will also terminate or be deleted. The nature of the guarantee agreement is an *accessoir* agreement. A guarantee agreement is a special agreement made by a creditor with a debtor or a third party that makes an appointment by binding a certain object or the ability of a third party with the aim of providing security and legal certainty of credit repayment or implementation of the principal agreement³.

The term guarantee comes from the word "guarantee" which means liability, so that the guarantee can be interpreted as a dependent on all the agreements of a person as mentioned in Article 1131 of the Civil Code as well as a dependent on a particular agreement of a person as stipulated in Articles 1139 to 1149 concerning special receivables, Articles 1150 to 1160 on Mortgages, Article 1162 to Article 1178 concerning Mortgages, Article 1820 to Article 1850 on debt insurer agreements⁶, besides that outside the Civil Code is stipulated in Law No. 4 of 1996 on Guarantee of Dependent Rights and Law No. 42 of 1999 on Fiduciary Guarantees.⁴

Initially, the legal provisions on fiduciary guarantees in Indonesia were based solely on jurisprudence. But as fiduciary guarantee agencies are increasingly used in business activities, the government eventually intervenes by making regulations in the form of legislation to provide legal

¹ D.Y Witanto, *Hukum Jaminan Fidusia Dalam Perjanjian Pembiayaan Konsumen*, Bandung : Mandar Maju, 2015, hlm.6

² J.Satrio, *Parate Eksekusi Sebagai Sarana Mengatasi Kredit Macet*, Bandung: Citra Aditya Bhakti, 1993, hlm.5.

³ Djuhaenda Hasan, *Lembaga Jaminan Kebendaan Bagi Tanah dan Benda Lain yang Melekat pada Tanah dalam Konsepsi Penerapan Azas Pemisahan Horizontal*, Bandung: Citra Aditya Bakti, hlm.236.

⁴ Jatmiko Winarno, *Perlindungan Hukum Bagi Kreditur Pada Perjanjian Jaminan Fidusia*, *Jurnal Independen Fakultas Hukum*, hlm 45.

certainty and legal protection for both creditors and debtors.

In 1999 was born Law No. 42 of 1999 on Fiduciary Guarantee hereinafter called UUJF, in Article 1 number 2 mentioned that:⁵

Fiduciary Guarantee is a guarantee of moving objects both tangible and intangible and immovable objects, especially buildings that cannot be burdened with Dependent Rights as referred to in Law No. 4 of 1996 concerning Dependent Rights that remain in the debtor's possession, as collateral for the repayment of certain debts, which gives priority to the Fiduciary Receiver to other creditors.

In credit agreements that often occur in the community that is used as a fiduciary object, one of which is a moving object in the form of a vehicle either in the form of a car or a motorcycle, but the guarantee for the repayment of installments by the debtor is in the form of documents of ownership of the vehicle. Transfer of Fiduciary guarantee in accordance with Article 19 uujf paragraph (1), that the transfer of rights to receivables guaranteed by Fiduciary resulted in the transfer for the sake of the law of all rights and obligations of fiduciary recipients to the new kreditor. Furthermore, the transfer of fiduciary guarantees referred to in paragraph (2) is registered by the new creditor to the Fiduciary Registration Office.⁶

With the transfer of Fiduciary Guarantee to other parties, Fiduciary guarantee according to Article 20 uujf will still follow the object of Fiduciary guarantee in the hands of whoever the object is, except the transfer of the inventory object that becomes the object of Fiduciary Guarantee. This is in accordance with the prinsip "Droit De Suite" which has been part of the Indonesian legislation in relation to the absolute right to materiality.

In connection with the transfer of Fiduciary Guarantee, Article 21 of the UUJF states that:⁷

- a. The Fiduciary may transfer the inventory object that becomes the object of fiduciary guarantee in a manner and procedure commonly performed in the trading business;
- b. Transfer does not occur if there has been a pledge by the debtor or fiduciary;
- c. Objects that become objects of Fiduciary Guarantee that have been transferred must be replaced by the Fiduciary provider and the same object;

In the event that the Fiduciary is injured, the result of the transfer and/or bill arising from the transfer for the sake of the law becomes the object of the fiduciary guarantee in lieu of the object of the transferred Fiduciary Guarantee. The provision reaffirms that the Fiduciary May transfer the inventory object to become the Fiduciary Guarantee Object. However, in order to safeguard the interests of the fiduciary receiver, the transferred object must be replaced with an equivalent object. What is meant by "diverting" among others includes selling or renting in the framework of its business activities. Furthermore, what is meant by "equivalent" is not only its value but also its type. What is meant by "injury promise" is not fulfilling achievements, whether based on the principal agreement, fiduciary guarantee agreement, or other guarantee agreement.⁸

In connection with the transfer of fiduciary guarantees, the buyer of fiduciary guarantee object objects which are inventory objects according to Article 22 uujf, free from demands even though the buyer is aware of the existence of the Fiduciary Guarantee, provided that the buyer has paid the full price of the sale of the object in accordance with the market price. What is meant by "market price" is a

⁵ Susanto, Kepastian Hukum Beralihnya Benda Jaminan Fidusia Karena Putusan Hakim (Studi Kasus PT. BII Finance Center), *Jurnal Surya Kencana Dua: Dinamika Masalah Hukum dan Keadilan* Vol. 3 No.2 Desember 2016, hlm. 82.

⁶ M. Yasir, Aspek Hukum Jaminan Fidusia (*Legal Aspect of Fiduciary Guaranty*), *Jurnal SALAM; Jurnal Sosial & Budaya Syar-i FSH UIN Syarif Hidayatullah Jakarta*, Vol. 3 No. 1 (2016), pp.75-92, hlm.87

⁷ UU Nomor 42 Tahun 1999 tentang Jaminan Fidusia

⁸ Gunawan Widjaja & Ahmad Yani, *Jaminan Fidusia*, Jakarta : Raja Grafindo Persada, 2000, hlm.105

reasonable price that applies in the market at the time of sale of the object, so it does not impress the fraud *darei fiduciary* parties in conducting the sale of the object. The obligation to register a fiduciary guarantee provides legal certainty to the interested parties and the registration of this fiduciary guarantee gives preference to the fiduciary recipient to other creditors.

Similarly, according to the Regulation of the Minister of Finance of the Republic of Indonesia Number 130/PMK.010/2012 concerning Registration of Fiduciary Guarantees for Financing Companies Financing Consumers for Motor Vehicles with Fiduciary Guarantee Loading.

That in the framework of consumer financing of motor vehicles by financing companies, consumers submit property rights to motor vehicles in a trust (*fiduciary*) to the financing company as stipulated in Article 1 paragraph 1 as follows, financing companies that conduct consumer financing for motor vehicles with the imposition of fiduciary guarantees are obliged to register the fiduciary guarantee referred to in the Fiduciary Registration Office, in accordance with the laws governing fiduciary guarantees as referred to in paragraph (1) shall also apply to financing companies conducting: and/or consumer financing of motor vehicles whose financing comes from channeling companies or joint financing.

Since the registration was done for the sake of property law switched from debtor to creditor and at the same time arising of the right to borrow from the debtor on the collateral object until the debt borne by the collateral is paid off. When the debtor's debt is paid off or declared paid off, then the ownership of the collateral will return to its original state that the debtor will become the owner again without the need to take any legal action, or in other words the restoration of ownership rights will occur for the sake of the law or by itself without the need for leveraging considering the collateral object from the beginning is in the control of the debtor.⁹

After the registration of the fiduciary guarantee deed, a fiduciary guarantee certificate is issued. The fiduciary guarantee certificate was born on the same date as the date on which the fiduciary guarantee was recorded in the Fiduciary Register Book. In the fiduciary guarantee certificate as referred to in Article 14 paragraph (1) is listed the words " For the Sake of Justice Based on the One True God", which intends to provide executionary power, which is the same as the court's decision that has obtained a permanent legal force. With this equatorial power, the fiduciary guarantee certificate can be executed immediately without going through the courts and is final and binding on the parties to carry out the award.

The legal consequence of an unlisted fiduciary agreement is that it does not give birth to a material agreement for the fiduciary guarantee, so that material characters such as the *droit de suite* and its preference rights are not attached to the fiduciary's creditors. Article 23 paragraph (2) of the UUJF, which will then be called UUJF states that: "Debtors are prohibited from transferring, pawning, or renting to other parties objects that become objects of Fiduciary Guarantee that are not inventory objects, except in advance written from the fiduciary recipient, from the provision that the object of fiduciary guarantee should not be transferred to another party without the consent of the fiduciary recipient.

Consequences in the event of transfer, mortgage or renting is carried out without the consent of the fiduciary recipient, then it can be categorized as the debtor has committed a default and can be subject to criminal law as stipulated in article 36 of the UUJF which specifies: Debtors who transfer, mortgage or rent objects that become the object of fiduciary guarantee as referred to in article 23 paragraph (2) conducted without prior written approval from the fiduciary recipient, are penalized with a maximum imprisonment of 2 (two) years and a maximum fine of Rp 50,000,000.000(fifty million rupiah).

⁹ D.Y Witanto, *Op.Cit*, hlm 130.

But in reality, there are still many debtors who transfer the object of fiduciary guarantees that are not inventory objects to third parties without the written consent of creditors. The results of the initial research on the transition of fiduciary guarantees to PT. Adira Dinamika Multifinace, Tbk Banda Aceh. In the financing credit agreement with Contract Number 064216200218 between PT. Adira Dinamika Multifinace with its Customers in Banda Aceh Region, Financing Agreement to one Unit of Mitsubitsi L300 Car, with principal debt of Rp.150.280.050. In the time of financing repayment, the Collateral Object in the form of one car unit is diverted to other parties outside the city, without knowing PT. Adira Dinamika Multifinace. In addition, the debtor also eliminates himself and obscures the existence of the fiduciary guarantee object.

Another thing also happened in the financing credit agreement with the number 064215201745 between PT. Adira Dinamika Multifinace with its Customers in Banda Aceh Region. Within the time of payment of the financing fiduciary Guarantee Object in the form of a car unit has been diverted to other parties outside the city, without knowing PT. Adira Multifinace. The Debtor promises to pay, therefore the PT. Adira Multifinace conducts deliberations by making a statement of willingness to pay off debts. Some of the factors that caused the transition were caused by the debtor who needed funds to pay the credit installments, the debtor's ignorance of the prohibition of transferring the fiduciary guarantee object without the creditor's consent, as well as the debtor's indifference to the maintenance of the fiduciary guarantee object.

In addition, this is also caused by the debtor also does not make a written permission application to rent or transfer the object of fiduciary guarantee on the grounds that the installment of the payment to be burdened by the debtor will increase from the normal installment payment so as to make the debtor does not notify either orally or in writing to the creditor. When the debtor does not have any problems in making installments, it does not matter. However, this will have an impact if the debtor is unable to pay off his credit, resulting in bad credit, so this will be a problem between the debtor and the creditor.

Based on the preliminary description above, this study examines how the procedure of transfer of motor vehicle collateral objects with fiduciary guarantees at PT Adira Dinamika Multifinance and How legal protection for creditors against the transfer of fiduciary collateral objects is carried out without knowing the creditors ?

Research Method

The research method used is normative legal research method. The materials used are primary legal materials, secondary legal materials, and tertiary legal materials. The primary data was obtained through interviews and field studies. The secondary data is obtained through the study of documents and literature.

Result and Discussion

Transfer of Fiduciary Guarantee Object Without Creditor Approval

Credit agreements with fiduciary guarantees govern the rights and obligations between creditors and debtors. The right is the granting of power to him to act in accordance with his interests. The rights and the rights of the tyres are interrelated. The performance of the obligations of the person will then give rise to the right to.¹⁰

The provisions of Article 23 paragraph (2) of the Fiduciary Guarantee Act determine that "fiduciary givers are prohibited from transferring, pawning, or renting to other parties objects that are objects of fiduciary guarantee that are not inventory objects, except with the prior written consent of the

¹⁰ Lidya Mahendra, "Perlindungan Hak-Hak Kreditur Dalam Hal Adanya Pengalihan Benda Jaminan Oleh Pihak Debitur", Acta Comitas (2016)2, hlm. 273

fiduciary recipient". The governance of the rights and obligations between the recipient and the fiduciary in the Fiduciary Guarantee Act will provide legal certainty for the parties, as long as the parties perform their obligations responsibly and in good faith in accordance with the mutually agreed, the rights of the parties will also be fulfilled.

In the fiduciary guarantee, the transfer of ownership rights is carried out with the *possessorium constitutum* i.e. the object that is handed over the ownership rights is transferred to the creditor but is still physically controlled by the fiduciary debtor for the benefit of the fiduciary recipient.¹¹

Generally in the practice of giving fiduciary objects used as fiduciary guarantees that are handed over to creditors and mentioned in detail the characteristics of the object of material. This needs to be done to avoid future disputes. Financing institutions or fiduciary guarantees usually govern the agreement in the form of a deed under hand as well as the mention in detail of the object of the guarantee.¹²

Credit granting by financing institutions, with guarantees in the form of motorcycles and creditors allow or entrust to the debtor to still be able to use the collateral goods to be used in accordance with its functions. During the use of the collateral, the debtor is obliged to be able to maintain as best as possible. This is in accordance with one of the principles embraced in the fiduciary guarantee, namely the principle of good faith. In this principle that the fiduciary guarantee who remains in control of the collateral must have good faith (*te goeder troow*, in good faith).¹³

The transfer of fiduciary guarantee object is stipulated in the third part of Law No. 42 of 1999 concerning Fiduciary Guarantee as article 19 stated: Transfer of rights to receivables guaranteed by fiduciary resulted in the transfer of the rights and obligations of fiduciary recipients to new creditors. (2) The transfer of fiduciary guarantee as referred to in paragraph (1) shall be registered by the new creditor to the Fiduciary Registration Office. Article 20 of the Fiduciary Guarantee continues to follow the Object that is the object of the Fiduciary Guarantee in the hands of whoever the Object is in, except for the transfer of the inventory object that is the object of the Fiduciary Guarantee.

Fiduciary registration begins with the submission of the initial document in the form of the requirements of making a fiduciary guarantee deed to the notary to be studied, then preparation of the object to be guaranteed along with the completeness of the file. At the time of submission of documents, a check list will be conducted. If all documents are complete, it can be processed immediately for the creation of a deed of principal agreement of receivables (credit agreement) and fiduciary guarantee deed as an additional agreement.

The removal of the alliance has a difference with the removal of an agreement. The removal of the alliance does not necessarily eliminate the existence of an agreement, it is unclear if all the alliances contained in the agreement have been deleted then the agreement will expire. The opposite result of the removal of an agreement resulted in the removal of the alliance. The matters that result in the expiration of an agreement under Article 1381 of the Civil Code there are ten things that can abolish an agreement, namely¹⁴.

- a. Payment. That is done through voluntary fulfillment of agreements.
- b. Cash payment offers are followed by storage.
- c. Debt Renewal

¹¹ Supianto, *Hukum Jaminan Fidusia: Prinsip Publisitas pada Jaminan Fidusia*, Yogyakarta: Garudhawaca, 2015, hlm.120

¹² J. Satrio(2), *Op.Cit*, hlm.129

¹³ Rilla Rininta dan Eka Satriya, *Pengalihan Objek Jaminan Fidusia Oleh Debitur Tanpa Persetujuan Kreditur Dalam Perjanjian Kreditbank*, Program Magister Kenotariatan Fakultas Hukum Universitas Narotama, Surabaya, 2015, hlm.46

¹⁴ Budiman N.P.D Sinaga, *Hukum Kontrak dan Penyelesaian Sengketa dari Perspektif Sekretaris*, Jakarta: Raja Grafindo Persada, 2005, hlm 20.

In a fiduciary guarantee agreement, if the collateral is submitted or controlled by the creditor, the fiduciary guarantee agreement is invalid. However, unlike if the debtor does not meet the obligations/defaults, the creditor may withdraw the fiduciary guarantee item for sale to cover the debtor's debt. Such action is not a legal act contrary to the Fiduciary Guarantee Act even the debtor has an obligation to submit the fiduciary guarantee object for sale.

As well as in the case of Dependent Rights stipulated in Law No. 4 of 1996 concerning The Right of Dependents, the Fiduciary Guarantee Certificate has the same equatorial power as the court ruling that has obtained a permanent legal force. Based on the title of execution, fiduciary recipients can directly carry out executions through public auctions on the object of fiduciary guarantees without going through the courts. In addition to the execution of objects that become the object of fiduciary guarantees based on the title of execution, the Fiduciary Law provides convenience in the execution of executions through the institution of execution *parate*.

In the execution of the fiduciary guarantee is also known in terms of mortgages as stipulated in paragraph 1155 of the Civil Code, the right of dependents as contained in article 6 jo Article 20 paragraph (1) a Law on The Rights of Dependents and Mortgages as referred to in article 1178 paragraph (2) of the Civil Code, which needs to be considered in the case of *parate* execution is that the sale of objects that become objects of fiduciary guarantee must be through public auction, because in this way it is expected to be obtained the highest price for the object of fiduciary guarantee.

In the Right of Dependents, to obtain the highest price in a "guarantee execution of the Right of Dependents can be carried out under the hands in the event of an agreement between the debtor and the creditor, to make a sale under the hand. The goal is to get the highest price that benefits the parties. This is stipulated in Article 20 paragraph (2) of the Law on The Rights of Dependents which states: upon the agreement of the giver and the holder of the dependent rights can be carried out under the hands if thus it will be able to obtain the highest price that benefits all parties"¹⁵

In the event that the sale through a general auction is not expected to produce the highest price that is favorable to both the Giver and the Fiduciary Receiver, it is possible to sell under the hand provided that it is agreed by the Fiduciary Giver and Receiver and the terms of the period of execution of the sale are fulfilled the possibility of the way of sale under the intended hand is to facilitate the matching of the fiduciary guarantee object with the highest sales price.

Especially in the case of objects that become the object of fiduciary guarantee of trading objects or securities that can be traded on the market or on the exchange, the Fiduciary Law stipulates that the sale can be done in such places in accordance with the prevailing laws and regulations⁴⁵ for securities listed on the exchange in Indonesia, applicable legislation in the field of Capital Market, similar arrangements are found also in the case of mortgage institutions as stipulated in Article 1155 KUHPerdata.

Provisions on the way of execution of fiduciary guarantees as stipulated in articles 29 and 31 of the Fiduciary Law are binding (*dwingen recht*) which cannot be ruled out at the will of the parties, deviations from those provisions result in that the deviation is null and void. That the fiduciary guarantee is a guarantee institution and that the transfer of ownership rights by means of *possessorium constitutum* is intended to solely provide collateral with the right that precedes the Fiduciary Recipient, then any promise authorizing the Fiduciary Recipient to possess the object of fiduciary guarantee is null and void.

¹⁵ Rosa Lianda Islami, Dahlan, Suhaimi, "Penggunaan Akta Kuasa Menjual Sebagai Jaminan Pelunasan Utang Dalam Peralihan Kepemilikan Hak Milik Atas Tanah", *Udayana Master Law Journal*, Vol. 9(4), Desember 2020, hlm. 850.

The transfer of fiduciary is stipulated in Article 19 to Article 24 of the Fiduciary Guarantee Act. Transfer of rights to debt (cession), i.e. transfer of receivables made by authentic deed or deed under hand. What is meant by diverting, among others, including by selling or renting out in the framework of its business activities. Transfer of rights to debt with fiduciary guarantee can be transferred by the fiduciary recipient to the new fiduciary recipient (new creditor). It was this new creditor who registered the fiduciary guarantee switch at the Fiduciary Registration Office.¹⁶

With this cession, all rights and obligations of the old fiduciary recipient are transferred to the new fiduciary and the transfer of the rights to the receivables is notified to the debtor. Article 19 of the Fiduciary Guarantee Act stipulates that the transfer of the right to receivables guaranteed by fiduciary guarantees results in the transfer by law of all rights and obligations of fiduciary recipients to new creditors. The transfer was registered by a new creditor to the Fiduciary Registration Office.

In the legal science of "transfer of rights to receivables" as stipulated in Article 19 of the Fiduciary Guarantee Act is known as *cessie* i.e. the transfer of receivables made by authentic deed or deed under hand. With *cessie* against the basic agreement that issued the receivables debt, the fiduciary guarantee as an assessment agreement, for the sake of the law also switched to the recipient of *cessie* rights in the transfer of the basic agreement. This means that, however, all rights and obligations of the old creditors are transferred to the new creditors.¹⁷

The transfer of fiduciary is stipulated in Article 19 to Article 24 of the Fiduciary Guarantee Act. Transfer of rights to debt (cession), i.e. transfer of receivables made by authentic deed or deed under hand. What is meant by diverting, among others, including by selling or renting out in the framework of its business activities. Transfer of rights to debt with fiduciary guarantee can be transferred by the fiduciary recipient to the new fiduciary recipient (new creditor). It was this new creditor who registered the fiduciary guarantee switch at the Fiduciary Registration Office. The consequences of the transfer of the right of this bill will also transfer the guarantee rights attached to the bill, when there is no transfer of property rights from the old creditor to the new creditor so as to keep the principle of the fiduciary as a transfer of property rights, then at the time the bill is passed to the new creditor there needs to be a firm statement about the transfer of property rights in the fiduciary guarantee

As mentioned in the explanation of article 19 uuft that the transfer of receivables is done by *cessie* or transfer of receivables carried out by a deed. Article 613 of the Civil Code states "The delivery of debt receivables on behalf of and other bodily goods is done by means of making an authentic deed or under the hands of the bestowing rights on the goods to others" in order for the transfer of fiduciary guarantees to be valid, then of course the flow is preceded by the transfer of receivables that become a valid basic agreement, if the transfer of receivables is void, it will be legally considered that the fiduciary guarantee is not *pernal* switching.

Debtors are prohibited from transferring, pawning or renting to other parties objects that become fiduciary objects, because fiduciary guarantees still follow the object of fiduciary guarantee into the hands of whoever the object is in. The exception to this provision is that the debtor can transfer over the inventory object that becomes the object of fiduciary guarantee.

In practice, financing institutions often ask for guarantees in the form of debtors' belongings both moving and immovable, given the frequent occurrence that the debtor commits a default or injury of promise. The existence of guarantees for the debtor is for the security of capital and legal certainty for the lender, this is the importance of the guarantee institution. In practice the bank as a creditor prefers material guarantees considering that this guarantee is more favorable to the creditor because the nature of this guarantee gives the creditor a better position than other creditors who do not have special

¹⁶ Salim HS, *Op. Cit.*, hlm.87

¹⁷ Gunawan Widjaja dan Ahmad Yani, *Op.Cit.*, hlm.155

guarantee rights¹⁸

Fiduciary guarantee as one of the material guarantees known in positive law, provides economic benefits for business businesses, judging by the mastery of collateral objects so that business activities can run and credit loans can be returned smoothly. The advantage can be seen from the mastery of collateral objects so that business activities can run and credit loans can be returned smoothly. The realization of fiduciary guarantees in the field is not in accordance with what is expected in other words still found violations. This is triggered because fiduciary guarantees are considered the easiest and easiest institutions to obtain additional capital carried out by everyone, because in the fiduciary guarantee it transfers a right based on mere trust.¹⁹

In fiduciary guarantee, the transfer of property rights between the debtor and the creditor is done in a *constitutum possessorium* which means that the object of the agreement is only handed over his property but in real terms the object is still in the authority of the debtor. Because the submission of property rights in Fiduciary is not done in real terms, the Fiduciary Law requires that fiduciary charges be made using notarized deed, it is to protect the interests of creditors.

Penyerahan secara *constitutum possessorium* melahirkan hubungan kepercayaan secara timbal balik, karena debitur memberikan kepercayaan kepada penerima fidusia sehingga penerima fidusia memiliki kekuasaan penuh untuk melakukan eksekusi atas barang jaminan jika debitur cidera janji. Sebaliknya penerima fidusia juga memberikan kepercayaan kepada debitur karena barangnya secara nyata berada dalam kekuasaan pihak debitur. Debitur diharapkan tidak menyalahgunakan kepercayaan yang diberikan atas penguasaan barang sehingga tidak menghalangi kekuasaan penerima fidusia untuk bisa mengambil pelunasan dari barang tersebut pada saat hak itu timbul, demikian juga sebaliknya.

In the legal science of "transfer of rights to receivables" as stipulated in Article 19 of the Fiduciary Guarantee Act is known as *cessie* i.e. the transfer of receivables made by authentic deed or deed under hand. With *cessie* against the basic agreement that issued the receivables debt, the fiduciary guarantee as an assessment agreement, for the sake of the law also switched to the recipient of *cessie* rights in the transfer of the basic agreement. This means all rights and obligations of the old creditors go to the new creditors. Because the switch of fiduciary guarantees occurs legally, it does not need to be proven by creating a new Fiduciary Guarantee Act. The registration of the fiduciary guarantee is sufficient based on a tool that proves the transfer of the right to receivables guaranteed to the new creditor.

In the process of transfer of bills guaranteed by fiduciary guarantees, containing two forms of transition, among others, the transfer of billing rights and the transfer of guarantee rights, the principle differs from the principle that applies to Pawn, Mortgage and Dependent Rights which when switching bills from the old creditor to the new creditor, then also the rights in the guarantee to the new creditor, such thing in the mortgage, mortgages and dependent rights are no problem, while in the fiduciary guarantee there will certainly be a transfer of property rights because as a consequence that the fiduciary is a guarantee that transfers the property rights of the owner of the property as a debt to the creditor.

The consequences of the transfer of the right of this bill will also transfer the guarantee rights attached to the bill, when there is no transfer of property rights from the old creditor to the new creditor so as to keep the principle of the fiduciary as a transfer of property rights, then at the time the bill is passed to the new creditor there needs to be a firm statement about the transfer of property rights in the fiduciary guarantee.

¹⁸ Dian Stevany Tongli, "Tanggung Jawab Debitur Terhadap Pengalihan Objek Jaminan Fidusia Tanpa Persetujuan Kreditur (Studi Putusan Pengadilan Negeri Kisaran Nomor 05/Pdt.G/2013/Pn.Kis)", Tesis Magister Kenotariatan, 2017, hlm.62

¹⁹ Dian Stevany Tongli, *Op. Cit.*, hlm.63

On the fiduciary guarantee agreement between PT. Adira Dinamika Multifinance, Tbk as a creditor with the debtors who become the object of loan guarantee leasing financing is motor vehicles. While the financing process is underway, some debtors do not carry out their obligations to pay credit and transfer the collateral object in the form of motor vehicles.

Based on the data, the leasing financing credit agreement occurred between PT. Adira Dinamika Multifinance with its Customers in Banda Aceh Region. One of the debtors with contract number: 0642.16.200218 and fiduciary guarantee object in the form of motor vehicles with car type does not carry out its obligations for credit payments for 14 (fourteen) months. On the other hand, the debtor also switches the object of the guarantee to his relatives without being noticed by the creditor.

The other financing agreement with contract number 064218202259 and the object of guarantee is a Unit Mobil Mitsubitsi L300, with a principal debt of Rp.150.280.050. When until the time of payment of the financing, the Collateral Object in the form of one car unit has been diverted to another party outside the city, without knowing PT. Adira Multifinance. In addition, the debtor also eliminates himself and obscures the existence of the fiduciary guarantee object.

The same situation also occurs in the financing credit agreement with the number 064215201745 between PT. Adira Dinamika Multifinance with its customers in Banda Aceh. At the time of payment of financing Fiduciary Guarantee Object in the form of a car unit has been diverted to other parties outside the city, without knowing PT. Adira Multifinance. The Debtor promises to pay the credit fee to the creditor therefore the PT. Adira Multifinance conducts deliberations by making a statement of willingness to pay off debts. The process of credit agreement of leasing financing between creditors and debtors is made in several stages. At the credit analysis stage, PT. Adira Dinamika Multifinance analyzes the requirements proposed by the debtor. The goal is to find out if the requirements proposed by the debtor are complete or not.

In analyzing credit, PT. Adira Dinamika Multifinance adheres to the principle of prudence. In addition, creditors in providing credit also see the nature or character of prospective debtors. This aims to give confidence on the part of the bank, whether the nature or character of the prospective debtor is truly trustworthy. These beliefs can be reflected in the background of work as well as those that are like the way of life that they follow, family circumstances and so on. Character is a measure to assess a customer's ability to pay their credit. In providing credit with this fiduciary guarantee, creditors must also look at prospective debtors from the ability of the customer in managing business and profit, so as to see the ability of the prospective debtor in returning credit.

Each customer who applies for credit must also provide funds from other sources or their own capital. This is to know the sources of financing owned by customers to businesses that will be financed by banks. However, this is less relevant in credit agreements with fiduciary guarantees. The fiduciary guarantee in this credit agreement is also a moving object with the transaction value must exceed the amount of credit given. In each agreement, the parties to the agreement have their own Rights and Obligations. In a credit agreement with fiduciary guarantee at PT. Adira Dinamika Multifinance, as the party of fiduciary guarantee dancer also has their own rights and obligations that must be implemented. The fiduciary here is a customer or debtor of PT. Adira Multifinance.

In the process of financing credit payments between creditors PT Adira Dinamika Multifinance and the debtors there is an agreement in order to fulfill the debtor's obligation to pay credit installments. The agreement is set forth in the Agreement on The Settlement of Remaining Debt. In the agreement stated that the payment of the remaining debtor's debt has been due, therefore the creditor gives a grace period to each debtor to pay off the debt. In the agreement it is also agreed that to guarantee the implementation of the payment of the remaining debt, the debtor guarantees his property in the form of motor vehicles. If within 3 (three) weeks the debtor is unable to perform its obligations, then the creditor will make a sale of the collateral to cover the remaining unpaid debt by the deditor.

In a fiduciary guarantee agreement, if the collateral is submitted or controlled by the creditor, the fiduciary guarantee agreement is invalid. However, unlike if the debtor does not meet the obligations/defaults, the creditor may withdraw the fiduciary guarantee item for sale to cover the debtor's debt. Such action is not a legal act contrary to the Fiduciary Guarantee Act even the debtor has an obligation to submit the fiduciary guarantee object for sale²⁰.

The agreement between the creditors of PT Adira Multifinance and the debtors is made in the form of a deed under the hands. Deed under its own hands is a deed made by the parties whose manufacture is not before a notary public. Fiduciary agreements made in the form of deed under the hand are caused by various factors including:

- a. There are no internal provisions requiring fiduciary guarantees to be notarized, particularly for Inventory guarantees;
- b. The company's legality is not aware of any fiduciary law provisions requiring that fiduciary guarantee agreements must be notarially entered into and registered with the fiduciary registration office;
- c. The main factor that causes the binding of fiduciary guarantees under the hands is to reduce the amount of costs that must be incurred by the debtor.

In the credit agreement the creditor's leasing financing allows and entrusts the debtor to still be able to use the collateral in accordance with its functions with the condition that while using the collateral, the debtor must maintain and maintain the object. This is certainly in accordance with the principle of good faith that states that fiduciary guarantees who remain in control of the collateral must have good faith (*te goeder troow*, in good faith). Based on the principle of good faith, debtors are also not allowed to transfer or rent and mortgage the object of guarantee to other parties. On the other hand, the provisions of the UUJF have explicitly stated a ban on debtors for Fiduciary Guarantee objects that are not supply objects to third parties without the approval of creditors.

This is based on Article 23 paragraph (2) of the UUJF which states that debtors are prohibited from transferring, pawning, or renting to other parties objects that become objects of Fiduciary Guarantee that are not material supplies, except with the prior written consent of the fiduciary recipient. If the debtor transfers the object of Fiduciary Guarantee which is not a supply object to a third party without written consent then the legal consequences are in the form of default and criminal sanctions. In the practice of leasing financing agreements the transfer of fiduciary collateral objects to third parties occurs due to various factors.

First, the factor of the agreement made in the form of a deed under the hands. An agreement set forth in the form of a deed under the hands has a lower position than an authentic deed. Moreover, if the deed under the hand is not legalized to a notary public, so that the deed can not be used as a perfect evidence of a contractual legal relationship in a particular business cooperation.

Second, the debtor needs funds to pay the credit installments every month. The legal consequences arising related to the switching of fiduciary guarantee objects in the Bank's credit agreements are inseparable from paying attention to the properties of the Fiduciary Guarantee as a material right stipulated in the UUJF. Transfer under the hands of a debtor who has not paid off his debt, is an act against the law because the fiduciary object is the object of guarantee of debtor's debt to creditors.

Therefore, the creditor can sue the debtor to provide compensation and immediately pay off the rest of the debt. The transfer of the fiduciary object under the hands of the debtor, does not eliminate the

²⁰ Tan Kamelo, *Op. Cit.*, hlm. 168

debtor's obligation to pay off his debt to the creditor.

Legal Protection for Creditors Against Transfer of Fiduciary Guarantee Objects

In the discourse of legal science there is a dialectic about the existence of the law as a system of norm statements that emphasize aspects of "should" or *das sollen* by including some rules on what to do. According to Peter Mahmud Marzuki "The law that contains general rules becomes a guideline for individuals to behave in society, both in relationships with fellow individuals and in relationships with the community. The rules are a limitation for the community in burdening or taking action against individuals. The existence of the rule and the implementation of the rule raises legal certainty".

Agreements in the cooperation of transportation between companies that provide route permits with vehicle owners are made in the form of agreements involving two parties, but when viewed in terms of content and position of the parties found the existence of an exoneration clause. The purpose of the exoneration clause is the clause stated in an agreement by which one party avoids fulfilling its obligation to pay full or limited damages incurred due to reseverity of promises or acts against the law (Yusnedi Achmad, 2015). According to Ahmadi Miru There are several characteristics of the exoneration clause including.

The agreement under the hand registered to the notary will be strong evidentiary value or equated with an authentic deed if no party disputes the signature stated on the letter and against the correctness of the contents of the letter of the agreement. Notary who makes the deed can account for the contents of the letter if in the making before the notary, but if the letter is made not before a notary public, the notary can only provide information in accordance with procedural and capacity authorized to register the letter of agreement under the hands of²¹.

Conclusion

The results showed that the agreement on the cooperation of transportation businesses that are legalized notary becomes weak if denied by one of the parties who signed it. Agreements under the hands of a notary legalization will be strong evidentiary value if no party disputes the truth of the agreement. Notary who makes the deed can be held accountable for the contents of the agreement if in the making before the notary, but if the letter is made not before the notary, the notary can only provide information in accordance with procedural and capacity authorized to register the agreement under the hands of. With regard to the transfer of rights to vehicles, has not provided protection to the rights of vehicle owners. That is because the agreement states that the transfer of the vehicle to a third party by the owner of the vehicle must be based on the written consent of the handling company, even if the vehicle is no longer a member of the transport company.

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²¹ Andrew Santiago Budiman, "Kepastian Hukum Buku Pendaftaran Surat Di Bawah Tangan Yang Dibuat Notaris Sebagai Alat Bukti Dalam Perkara Perdata", Skripsi Ilmu Hukum Fakultas Hukum Universitas Muhammadiyah Sumatera Utara, 2018, hlm.41.

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